

**IN THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA**

**T & R TRUCKING CO., INC., a
West Virginia corporation,**

Appellant,

VS.

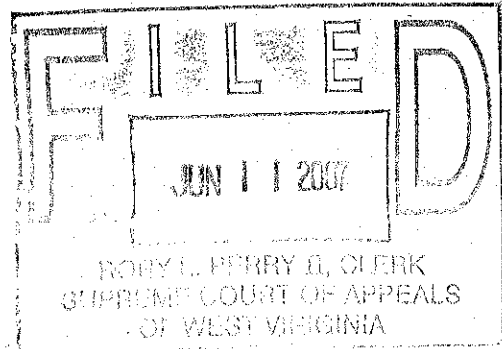
RICK MAYNARD,

Appellee,

VS.

**TOM BENJAMIN FARLEY, individually and
in as official capacity as President of
T & R TRUCKING CO., INC., a
West Virginia corporation,**

Appellant.



APPEAL NO. 33346

**BRIEF IN REPLY ON BEHALF OF APPELLANTS,
T & R TRUCKING CO., INC. AND TOM BENJAMIN FARLEY
TO THE BRIEF OF APPELLEE**

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CONTENTIONS OF APPELLEE

Appellee states that Maynard became a subcontractor for T & R Trucking to do "off road coal hauling" which is incorrect. When Appellee, Maynard, was employed by the Appellant, T & R Trucking Co., Inc., in 1998, at which time he had a valid driver's license and an independent coal mine truck driver's certification as required by law, he was hauling coal for Appellant on the haul roads of the Pen Coal Company property, which were county roads under the jurisdiction of the Sheriff and State Police and were not "off roads." He returned to employment in June 2000 hauling over the same county and state roads on the Pen Coal property. When he became a subcontractor, he was still hauling over the same county and state roads, which required not only a driver's license but a coal mine truck driver certification.

Appellee Maynard did not, as stated by Appellee, make his monthly payments from April 2001 through and including February 2002. He failed to make a payment for the month of September 2001 and made no payment in February 2002 and thereafter.

Appellee contends that after February 2002, Thomas B. Farley, Jr. disappeared, in that his office was closed and no one knew his whereabouts, which again is incorrect. He had Mr. Farley's Chapmanville telephone number and knew that he lived in Chapmanville. Mr. Farley's name and address were listed in the Chapmanville telephone book. He had talked to Mr. Farley many times before on the telephone and could easily have contacted him and found out where he could deliver his truck payment. When Pen Coal went into bankruptcy, the T & R Trucking office at Pen Coal was closed, however, Mr. Farley was there everyday for several months moving equipment in and out of the Pen Coal property and could certainly have been found at the office. In addition, the guard shack at Pen Coal had Mr. Farley's address also, as did the Pen Coal office, which remained open. He certainly could have mailed the payment to the mailing address of T &

R Trucking. The address of P.O. Box 70, Delbarton, WV 25672 was printed on the checks and invoices.

Appellee contends that Financial Federal Credit contacted him and informed him that the truck was to be repossessed due to failure to make payments on the truck. Again, this is not true. T & R Trucking was in contact from time to time with Gary Pace of Financial Federal and Financial Federal did not consider T & R Trucking Co., Inc. to be in default and, if so, would have called T & R Trucking not Maynard. If Financial Federal had wanted to repossess the truck, they would have just picked it up. They would have sent someone to drive the truck to wherever they wanted to take it or, at the least, they would have asked Maynard to deliver it or park it some where where they could obtain it. Instead, Maynard abandoned the truck on the Triad Mining property, calling Mr. Farley and leaving word on his answering machine that "it's sitting up there, better do something with it."

Appellee claims "there was not a scintilla of evidence that the truck has been abandoned by Rick Maynard." Maynard parked the truck somewhere on the Triad Mining property with no keys in it and the doors unlocked (tr. p. 143). He made no explanation as to why he didn't park the truck at his home, return it to T & R Trucking Co., Inc. or otherwise. Clearly, that is abandonment.

Appellee states that Appellant asserts that Maynard may have removed parts and damaged the truck. What was stated in the brief of Appellant was that "After defendant, Maynard, abandoned the truck on the Triad Mining property, he either removed parts and damaged the same or it was vandalized by others and, as shown by the repair estimate of Stephen's Truck & Trailer Sales, Inc., the damage amounted to \$23,507.29.

Appellee states that there was not a scintilla of evidence to support the assertion that Maynard defaulted in his payments to his insurance company. Witness, Judith Gail Farley, (no relation to

Thomas B. Farley, Jr.) testified that she owns Shamrock Insurance Agency; that she wrote the insurance policy for Shepherd Trucking; the premium was paid with a 25% down payment and the rest of the premium was financed with what is known as a premium finance company, and that policy was canceled for nonpayment of premium during the first year of the policy. (Trial transcript p. 177).

Appellee states "There is not a scintilla of evidence that Rick Maynard suffered from alcoholism." Maynard was arrested for driving under the influence December 1, 1984; June 30, 1991; February 28, 1992; September 15, 1997; May 1, 2000; June 16, 2000; September 25, 2000; April 5, 2001; and September 29, 2003. (See Division of Motor Vehicles certification attached hereto.) By Order entered February 1, 2001, eight months after returning to employment with T & R Trucking Co., Inc., Appellee was sentenced to home confinement permitting him to return to work during regular work hours and ordering him not to drive on any public highway whatsoever, all as a result of driving under the influence, third offense. (See attached Sentence Order.) From all of this, it certainly would appear that Rick Maynard suffers from alcoholism.

Appellee contends that T & R Trucking Co., Inc. was always behind on its payments to Financial Federal Credit. As testified by Thomas B. Farley, Jr., the rear end housing on the Western Star trucks of T & R Trucking Co., Inc. had problems, as a result of which they were returned to the dealer, Stephens Truck & Trailer Sales. Financial Federal convinced T & R to take the two trucks back and to bring its payments up to date whenever it could. At that time, it was three or four months behind (tr. p. 46-49).

After agreeing to the lease purchase of the truck with Maynard, prior to which T & R had already made arrangements with Gary Pace of Financial Federal to catch up his payments when it could, T & R Trucking made the following payments:

March 19, 2001 in March

April 2, 2001 in April

May 4, 2001 in May

June 12, 2001 in June

June 12, 2001 for the month of July

July 18, 2001 for the month of August

August 6, 2001 for the month of September

August 6, 2001 for the month of October

September 27, 2001 for the month November

January 11, 2002 for the month of December

February 25, 2002 for the month of January

March 12, 2002 for the month of February

March 12, 2002 for the month of March

(Tr. p. 152-155).

Appellee contends that T & R Trucking Co., Inc. routinely wrote bad checks to others. In 2001, continuing through 2002, T & R was having problems with Pen Coal Company paying it and then Pen Coal filed bankruptcy and T & R ended up having to quit hauling for them, all of which caused problems in timely paying bills (tr. p. 52-53).

LIABILITY OF THIRD PARTY DEFENDANT, THOMAS B. FARLEY, JR.

Appellee contends that since Thomas B. Farley, Jr. was the chief officer of the corporation, T & R Trucking Co., Inc., that he is personally liable. The trial court disagreed.

After the jury verdict on September 19, 2006, counsel for T & R Trucking Co., Inc. and Thomas B. Farley, Jr. made his Motion to Dismiss Thomas B. Farley, Jr. and the Court stated

(beginning at page 19 in the transcript of Proceedings of September 19, 2006) "so I'm trying to remember if there was any evidence that there was any conduct that was by Mr. Farley that was beyond his scope and his role as corporate officer. That is more of the reason why I separated - - made the verdict form where it separated the two. I do not want to confuse the issue for the jury by just saying Thomas Farley, Jr., and T & R Trucking, a corporation, as a third-party defendant jointly. I don't know how the jury would view that.

"I think I do have to review some of the rulings and some of the evidence in this case to make a ruling on that. My gut feeling is that probably he enjoys the protection of the corporation from his personal assets in this dealing. I think the truck was owned by T & R Trucking. The contract was made with T & R Trucking. The checks were all T & R Trucking. The payments were received at the office of T & R Trucking. The secretary of T & R Trucking handled most of the accounting. I'm going to withhold ruling on that issue." The Court never made any ruling.

JURY VERDICT FORM

Counsel for Appellee stated "Prior to the jury returning to the courtroom for the instruction and jury verdict form, the Court gave all counsel a copy of the new jury verdict form: no objection was made by Appellant's counsel." The transcript of the trial proceedings does not contain any such action having been taken. Appellant's counsel absolutely, positively did not receive any "new jury verdict form." Therefore, there was nothing to which to object.

Appellee further states "To further demonstrate that all parties were given a copy of the jury verdict form, the Appellee's counsel showed the jury verdict form to the jury during closing argument and explained it to the jury" and then quotes the trial transcript with reference to part of the closing argument in which counsel does refer to a jury verdict form, but certainly does not show it to the jury. Appellee then further states "Any suggestion that the parties did not get a copy of the

jury verdict form that the jury took to the jury room simply is not accurate and is misleading."

Appellant cannot state that counsel for Appellee did not receive a jury verdict form but certainly can state that counsel for Appellant never received a copy of this jury verdict form.

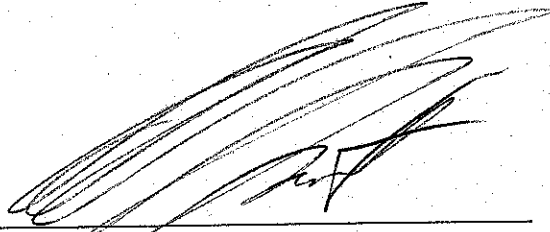
Appellee cites the case of State Ex. rel. Valley Radiology, Inc. v. Gaughan, 220 W. Va. 73, 640 S.E.2d 136, for the proposition that objection to any defect in the verdict form must be made before the jury is discharged. The actual holding of that case is:

"Recognizing that a litigant has a responsibility to timely object to a verdict form that is irregular in form, we held in syllabus point two of *Combs*: Absent extenuating circumstances, the failure to timely object to a defect or irregularity in the verdict form when the jury returns the verdict and prior to the jury's discharge, constitutes a waiver of the defect or irregularity in the verdict form." 205 W. Va. at 103, 516 S.E.2d at 507. Based upon the presence of extenuating circumstances in *Combs* - the trial court's failure to show trial counsel the verdict form before dismissing the jury - we found that the plaintiff had not waived his right to object to the jury form. See *id.* at 108, 516 S.E.2d at 512." In footnote 2 of that decision, it is stated "This Court fully recognized that there are exceptions to the general rule of waiver announced in *Combs* by explicitly providing that the presence of "extenuating circumstances" in a given case may counsel against waiver. See *Combs*, 205 W. Va. at 103, 516 S.E.2d at 507, Syl. Pt. 2. Such extenuating circumstances - the failure of the trial court to show trial counsel the verdict form prior to the jury's discharge - were relied upon by this Court in *Combs* to prevent waiver and to allow a new trial to be held on damages alone." Therefore, Appellant's objection was not and is not waived.

CONCLUSION

Appellants respectfully submit that the Judgment Order of the Circuit Court of Wayne County, West Virginia should be set aside and this matter be returned to the Circuit Court of Wayne

County for another trial.

A handwritten signature in dark ink, appearing to be 'C. E. Hurt', written over a horizontal line.

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